

JEFFREY CORNELL
Claimant

**A & L UNDERGROUND, INC.,
n/k/a CIMARRON UNDERGROUND, INC.**
Respondent

FEDERAL INSURANCE COMPANY
Insurance Carrier

Claimant argues he verbally provided notice of his accidental injury immediately after it occurred to his supervisor, Mr. Poovey, and again provided verbal notice to Mr. Poovey on the last day claimant performed work for respondent on approximately February 13, 2014. Claimant also maintains he gave notice via text message to Mr. Poovey on

February 21, 2014. Claimant therefore contends he provided timely notice to respondent and the ALJ's Order should be affirmed.

The sole issue raised for consideration by the Appeals Board is: did claimant give respondent notice of his personal injury by accident in compliance with K.S.A. 2013 Supp. 44-520?¹

FINDINGS OF FACT

Claimant began working for respondent in May 2013. Respondent is in the business of working on gas distribution pipelines. Claimant worked initially for respondent as a laborer, but was promoted to welder helper prior to his accidental injury. As a welder helper, claimant worked with pipe fittings, pipe, flanges, sockets, welder lifts and other welding equipment. He positioned pipe, retrieved and set up equipment needed by the welder and engaged in general cleanup.

In July 2013, claimant commenced work at respondent's project in the Hutchinson/Conway, Kansas area. In this project, respondent was subcontracting for Nustar Energy. The project was completed in February 2014.

Claimant's accidental injury occurred when claimant's welding foreman, Eric Poovey, asked him to retrieve six 600-pound series eight-inch flanges. As claimant loaded the last flange, he felt a pop in his left shoulder. After delivering the flanges, claimant told Mr. Poovey he had injured his shoulder lifting the flanges. Mr. Poovey told claimant to take it easy for the rest of the day.

Claimant did not fill out an accident report, nor did Mr. Poovey. Claimant was neither told to fill out a report, nor was he provided an accident report form. Claimant testified he was unsure what to do because both his superintendent, Paul Myers, and his welding foreman, Mr. Poovey, reportedly told him and other employees that any reportable injury could jeopardize future work from Nustar and everyone would lose their jobs. Claimant, Mr. Myers, and even Mr. Poovey testified to the effect that Mr. Poovey was claimant's direct supervisor and instructed him what duties to perform.²

On approximately February 13, 2014, claimant's last day of work on the Hutchinson project, Mr. Poovey asked claimant to pull up some fenceposts. Claimant told him he could not do that task and reminded Mr. Poovey he had injured his shoulder. Mr. Poovey responded he would get someone else to do the fencepost work. Claimant testified when

¹ Before the ALJ, respondent raised the issue of whether claimant sustained personal injury by accident arising out of and in the course of his employment. However, that issue is not raised to the Board.

² Claimant's Depo. at 18; Myers Depo. at 21; Poovey Depo. at 20.

he told Mr. Poovey about his injury, he told him the time, place, date and specifics of the injury.³

Respondent laid claimant off on February 26, 2014.

After the injury, claimant thought he had just strained his shoulder, so he tried to treat it himself by using ice and taking Aleve.

After claimant returned to his residence in Texas, he saw R. Stogryn, M.D. in San Antonio on March 15, 2014. Dr. Stogryn recommended x-rays and MRI scans of claimant's cervical spine and left shoulder. Dr. Stogryn's diagnostic impressions were cervical sprain and probable torn left rotator cuff.

Eric Poovey testified he was employed by respondent as a welder doing pipeline work. Mr. Poovey became acquainted with claimant when claimant commenced work for respondent as a laborer and then a welder helper. Mr. Poovey testified he was not claimant's supervisor. Mr. Poovey stated superintendent Paul Myers was the supervisor for he and claimant.

Mr. Poovey testified claimant did not tell him he hurt his shoulder while lifting flanges on February 7, 2014. Mr. Poovey recalled claimant saying something about his shoulder bothering him but claimant continued to perform his job. Mr. Poovey did not recall claimant relating his shoulder problem to any specific event at the job site.

According to Mr. Poovey, claimant did not show any signs of having problems with either shoulder, and claimant performed his job every day and did not ask for special accommodation. Mr. Poovey did not see claimant rubbing his shoulder or hear claimant say he could not do the job because his shoulder hurt.

Mr. Poovey testified he did not notify his supervisor, Mr. Myers, about claimant's shoulder injury because he (Mr. Poovey) was not aware of any injury.

Mr. Poovey testified that on June 5, 2014, he sent an email to Paul Myers about a text message claimant sent to Mr. Poovey on February 21, 2014, stating claimant was "[s]till trying to heal [his] shoulder." According to Mr. Poovey, sometime around June 5, 2014, was the first he knew claimant was claiming an on-the-job injury. Respondent's corporate office contacted Mr. Poovey's supervisor, Paul Myers, and Mr. Myers called Mr. Poovey to tell him what was going on.

Mr. Poovey testified if respondent received another safety violation or any kind of recordable injury, Nustar would probably not ask respondent to perform future work.

³ Claimant's Depo., at 39.

Mr. Poovey testified claimant was his welder helper, and he instructed claimant what to do. Mr. Poovey stated the superintendent could direct claimant and Mr. Poovey, but he could also direct claimant's activities. At some point during the Hutchinson job, claimant made Mr. Poovey aware he was having problems with his shoulder. Mr. Poovey testified the flanges claimant lifted on the Hutchinson job weighed up to 300 pounds. Mechanical assistance was used for heavier items.

Mr. Poovey stated he knew claimant's shoulder was bothering him at the Hutchinson project. When Mr. Poovey received the February 21, 2014, text message from claimant, he knew claimant was still having problems with his shoulder. From the February 21 text, Mr. Poovey knew claimant was claiming an injury to his shoulder.⁴

Mr. Poovey testified he had no idea claimant was claiming a shoulder problem related to a work injury prior to June 5, 2014. Mr. Poovey testified a 600 series flange refers to 600 pounds of pressure, not the weight of the flange

Paul Myers testified he was a superintendent/supervisor for respondent. In that capacity, he ran projects and work crews. Mr. Myers testified he was superintendent on the Hutchinson project until its completion in February, 2014. Mr. Myers testified he was made aware claimant claimed he was injured on February 7, 2014, in approximately April or May, 2014. Respondent's corporate office asked Mr. Myers to have a writing prepared about the alleged injury.

Mr. Myers testified everyone working on the Hutchinson project was beneath him in the chain of command. Since Mr. Poovey was a welder, and claimant was his welder helper, Mr. Poovey was authorized to direct claimant's job activities. According to Mr. Myers, claimant reported to him but claimant also reported directly to Mr. Poovey.

Mr. Myers testified it was brought up a few times at the safety meetings if there were any more recordable accidents by employees, respondent was in jeopardy of losing future work from Nustar. This was brought up by Mr. Poovey and a safety person from Nustar.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2013 Supp. 44-520 provides:

- (a) (1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
 - (A) 20 calendar days from the date of accident or the date of injury by repetitive trauma;

⁴ Poovey Depo. at 25-26.

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 10 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that: (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

The Board agrees with the ALJ that claimant sustained his burden to prove he gave respondent timely notice of his accidental injury pursuant to K.S.A. 2013 Supp. 44-520. There is no dispute the period in which respondent had to be given notice was 20 calendar days from the date of accident, or in this claim, by February 27, 2014.

Before February 27, 2014, claimant gave respondent notice of his injury by accident on at least three occasions as follows:

1. On February 7, 2014, the same date claimant sustained accidental injury, he provided notice thereof to his direct supervisor, Mr. Poovey, the welder on work crew for the Hutchinson project. Claimant told Mr. Poovey he injured his shoulder lifting the last flange, to which Mr. Poovey responded, "Just take it easy for the rest of the day. We can't afford another reportable injury. That was drilled into us repeatedly over and over and over

again.”⁵ Although Mr. Poovey did not recall claimant reporting a specific traumatic event, he did admit he was aware claimant was experiencing shoulder problems near the end of the Hutchinson project.⁶

2. On February 13, 2014, claimant again provided Mr. Poovey notice of his shoulder injury after Mr. Poovey asked claimant to remove some fenceposts.

3. On February 21, 2014, claimant provided Mr. Poovey with a text message in which claimant referred to “[s]till trying to heal my shoulder.”⁷ Mr. Poovey prepared an email to Mr. Myers which was forwarded to respondent’s corporate offices. Mr. Poovey testified he was aware claimant was claiming an injury to his shoulder by the time he received claimant’s text message.

Respondent contends Mr. Poovey was not his supervisor. However, as the ALJ noted, the preponderance of the credible evidence does not support that notion. Claimant testified Mr. Poovey was the welding foreman and his direct supervisor.⁸ Mr. Myers testified Mr. Poovey was authorized to direct claimant, instruct him or give him orders on the job.⁹ Even Mr. Poovey admitted on cross-examination he had the authority to direct claimant regarding his job activities.¹⁰

Claimant testified when he told Mr. Poovey about his injury, he told him the time, place, date and specifics of the injury.

Claimant has proven timely notice as mandated by K.S.A. 2013 Supp. 44-520.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, only one Board Member determined this review of a preliminary hearing Order, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁵ Claimant’s Depo. at 25.

⁶ Poovey Depo. at 24.

⁷ *Id.*, Ex. 1.

⁸ Claimant’s Depo. at 18.

⁹ Myers Depo. at 21.

¹⁰ Poovey Depo. at 20.

¹¹ K.S.A. 44-534a(a)(2).

CONCLUSIONS

1. Claimant has sustained his burden to prove he gave respondent timely notice of his accidental injury in compliance with K.S.A. 2013 Supp. 44-520.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Thomas Klein dated August 13, 2014, is affirmed.

IT IS SO ORDERED.

Dated this ____ day of November, 2014.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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Honorable Thomas Klein, Administrative Law Judge